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SURFACE TRANSPORTATION BOARD

Docket No. FD 35496

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION—PETITION FOR DECLARATORY ORDER

Digest:[1] The Board denies reconsideration of its prior decision finding that the activities on a parcel of land leased by Denver & Rio Grande Railway Historical Foundation do not constitute transportation within the Board's jurisdiction. Therefore, a local ordinance is not preempted with respect to the parcel.

Decided: March 20, 2015

In this case, the Denver & Rio Grande Railway Historical Foundation (DRGHF) filed a petition asking the Board to declare that a zoning ordinance of the City of Monte Vista, Colo., (the City) is preempted under 49 U.S.C. § 10501(b) with respect to a 1.84-acre parcel of land (Parcel) DRGHF leases in the City. DRGHF filed the petition in response to the City's enforcement action charging Mr. Donald Shank, President and Executive Director of DRGHF, with storing railcars on the Parcel in violation of the zoning ordinance, which prohibits storing rail cars except on track connected to a rail line. In a decision served on August 18, 2014 (August 18 Decision), the Board determined that DRGHF's use of the Parcel is not in support of transportation subject to the Board's jurisdiction and therefore concluded that the City's zoning ordinance is not preempted with respect to the Parcel.

On September 8, 2014, DRGHF filed a petition asking the Board to reconsider the August 18 Decision, citing material error and new evidence. The City and San Luis & Rio Grande Railroad (SLRG), a Class III short line rail carrier (collectively Respondents), filed a joint reply statement on September 25, 2014. For the reasons discussed below, DRGHF's petition for reconsideration will be denied.

PRELIMINARY MATTERS

In its petition for reconsideration, DRGHF indicates that it has hired Eric Strohmeyer as its Director of Freight Services and that he "will be filing a verified statement in this proceeding detailing [DRGHF's] past, present, and future plans and initiatives."[2] On September 30, 2014,

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[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] DRGHF Pet. for Reconsideration 13.

Strohmeyer filed: (1) a "Notice of Intent to Participate With Comments" (Notice), which indicated that he would participate both in his capacity with DRGHF and in his individual capacity (and included some substantive comments filed in his individual capacity); and (2) a letter requesting an extension of time to October 20, 2014, to file a verified statement as DRGHF's Director of Freight Services. The Board, in a decision served on October 16, 2014, granted the requested extension and gave interested persons 10 days from the filing date of the verified statement to file replies.[3] Strohmeyer, however, ultimately did not file a verified statement.

On October 29, 2014, James Riffin filed a "Notice of Intent to Participate as a Party of Record With Comments or in the Alternative Motion to Intervene." On November 18, 2014, the City and SLRG filed a joint motion to strike and reply to Riffin's filing. Riffin has not demonstrated a sufficient interest in the proceeding to warrant granting leave to intervene as he did not seek to intervene until after the Board issued its decision on the merits and denied a motion to stay its merits decision. Riffin has no business or employment relationship with DRGHF and his pleading is either an untimely petition for reconsideration of one of the Board's earlier decisions in this matter, or an untimely response to arguments made in SLRG's timely reply to the petition for reconsideration that had been filed earlier in the case. Furthermore, Riffin's October 29 filing was not permitted under the October 16 order. Therefore, his motion is denied.

BACKGROUND

DRGHF is a Colorado not-for-profit corporation that is considered to be a Class III railroad because it bought a to-be-abandoned rail line pursuant to an offer of financial assistance (OFA) under 49 U.S.C. § 10904. Specifically, DRGHF, doing business as the Denver & Rio Grande Railway, L.L.C., acquired the Creede Branch (the Line), a 21.6-mile rail line extending between milepost 299.3 near Derrick (at South Fork, Colo.), and the end of the line near milepost 320.9 in Creede, Colo., from Union Pacific Railroad Company (UP) in 2000 through the OFA process.[4] At South Fork, the Line connects to SLRG's Alamosa Subdivision, a 149-mile rail line extending east from its connection with DRGHF at South Fork, through Monte Vista, to its

[3] On October 20, 2014, Respondents filed a "Joint Motion to Strike" and, in the alternative, a reply to Strohmeyer's Notice. Respondents' motion to strike will be denied, and their reply will be accepted into the record.

[4] See Union Pac. R.R.—Aban. Exemption—in Rio Grande & Mineral Cntys., Colo., AB 33 (Sub-No. 132X) (STB served May 11, 1999). In 2008, the Board granted the City of Creede's application for adverse abandonment of a one-mile portion of the Creede Branch, from milepost 320.9 to near milepost 319.9, in the City of Creede. See Denver & Rio Grande Ry. Historical Found.—Adverse Aban.—in Mineral Cnty., Colo., AB 1014 (STB served May 23, 2008).

connection with UP near Walsenberg, Colo.[5] Freight rail service into Creede ceased in 1969 and on the remainder of the Line by the mid-1980s. The switch connecting the Line to SLRG's Alamosa Subdivision at South Fork was locked in 2008 at the order of the Federal Railroad Administration (FRA).

As noted, DRGHF leases a 1.84-acre parcel of land in the City of Monte Vista. The Parcel is located approximately 30 miles east of the Line, adjacent to SLRG's Alamosa Subdivision in Monte Vista. Rio Grande Southern Railroad Company, LLC, DRGHF's noncarrier affiliate, acquired the Parcel from SLRG in 2005 and leased it to DRGHF. A spur off of the Alamosa Subdivision, known as Track 15, crosses the Parcel. SLRG owns the portion of the spur on the Parcel and an easement underlying it.

DRGHF claims that the Parcel is needed to support rail operations on the Line, which when acquired came without any buildings or maintenance facilities, and a limited number of side tracks and storage locations. According to DRGHF, the Parcel is used to store rail cars, rail car parts, and other railroad related equipment and materials and to restore, maintain, renovate and otherwise perform work on rail cars for use or anticipated use on the Line and for transportation-related purposes by other rail carriers. DRGHF states that "[s]ome cars reside on Track 15, some on panel track built to accommodate railcars and some temporarily on blocks awaiting trucks and rehabilitation."[6] DRGHF claims that it modified a former UP Railway Post Office car on the Parcel and leased it to SLRG for use as a concession car on SLRG's passenger excursion train during 2006 through the end of the 2007 summer season.[7] It also claims that it leased a locomotive to SLRG's parent, Permian Basin, for use by SLRG in 2006-2007.[8]

In the August 18 Decision at 8, the Board pointed out that its "jurisdiction over transportation by rail carrier (and thus transportation within the reach of § 10501(b) preemption) only extends to transportation between, among other things, 'a place in . . . a State and a place in the same or another State as part of the interstate rail network." 49 U.S.C. § 10501(a)(2)(A). Citing Napa Valley Wine Train, Inc.—Petition for Declaratory Order (Wine Train), 7 I.C.C. 2d 954, 965-68 (1991), the Board found that the limited, wholly intrastate excursion passenger and related raft operations that DRGHF has conducted over the Line to date are not transportation under the Board's jurisdiction at § 10501. Accordingly, the Board concluded that the activities taking place on the Parcel "are not transportation that is conducted under the Board's jurisdiction

[5] SLRG is a wholly owned subsidiary of Permian Basin Railways, Inc. (Permian Basin), which in turn is a subsidiary of Iowa Pacific Holdings, LLC (IPH), a holding company. See Permian Basin Rys.—Acquis. & Control Exemption—San Luis & Rio Grande R.R., FD 34799 (STB served Jan. 12, 2006).

[6] DRGHF Pet. for Declaratory Order 3.

[7] DRGHF Rebuttal Statement 10.

[8] Id.

'as part of the interstate rail network' …. [and thus] provide no basis for finding the City's ordinance preempted under § 10501(b)."[9]

DISCUSSION AND CONCLUSIONS

A party may seek to have the Board reconsider a decision by submitting a timely petition demonstrating material error in the prior decision or identifying new evidence or substantially changed circumstances that would materially affect the case. See 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3(b). A party alleging material error must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009). New evidence must be newly available. Reconsideration is not warranted if the pertinent evidence was available before the agency's decision but was not timely raised. See Friends of Sierra R.R. v. ICC (Friends of Sierra), 881 F.2d 663, 667 (9th Cir. 1989). The alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected. See Canadian Nat'l Ry.—Control—EJ&E West Co., FD 35087 (Sub-No. 8), slip op. at 8 (STB served Nov. 8, 2012). If a party has not demonstrated material error or presented new evidence or evidence of substantially changed circumstances that would mandate a different result, then the Board will not grant reconsideration. See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Or. Int'l Port of Coos Bay—Feeder Line Appl.—Coos Bay Line of Cent. Or. & Pac. R.R., FD 35160, slip op. at 2 (STB served Mar. 12, 2009). As discussed below, we find no material error or new evidence warranting reconsideration of the August 18 Decision.[10]

1. Allegations of Material Error. DRGHF reiterates its claim that the Parcel is needed to support operations on the Line, stating that four "historic wooden car bodies" were painted on the Parcel and were to be moved to the Line to serve as maintenance-of-way storage sheds (but remain on the Parcel serving as maintenance-of-way storage sheds)[11] and that four "standard gauge stock cars" are to be rehabilitated on the Parcel for "moving stock intra-line" on the Line.[12] DRGHF contends that it "had sought and solicited the movement of freight (livestock)" over the Line and that it intends to continue to do so.[13] Further, DRGHF argues that: (1) the Board found it to be a Class III rail carrier and is bound by that finding; (2) the fact that it does not have a formal interchange agreement with SLRG is not an impediment to interstate commerce when rail carriers are in fact interchanging cars with one another;[14] (3) its leasing of

[9] August 18 Decision at 18.

[10] DRGHF does not allege substantially changed circumstances.

[11] DRGHF Pet. for Reconsideration 6-7.

[12] Id. at 6.

[13] Id. at 8.

[14] Id. at 9-10.

rail cars (the Post Office car and locomotive) is an "integral part of the railroad's interstate operations";[15] and (4) its storage of these rail cars "is a use of the Parcel which constitutes 'Transportation.'"[16]

To be within the Board's jurisdiction and thus covered by preemption under § 10501(b), an activity: (1) must be performed by, or under the auspices of, a "rail carrier"; and (2) must constitute transportation. See § 10501(a)(1), (b)(1). As the Board noted in its August 18 Decision, because it bought a line in an OFA sale, DRGHF is indeed considered to be a Class III rail carrier. August 18 Decision at 1. However, not all of a rail carrier's activities are inherently transportation falling under the Board's jurisdiction and thus covered under § 10501(b).[17] The Board found that DRGHF was conducting only intrastate passenger excursion service and related movement of rafts. As those activities are not transportation under the Board's jurisdiction, neither are DRGHF's supporting activities on the Parcel. DRGHF's status as a Class III rail carrier does not change the non-jurisdictional character of those activities.

DRGHF now alleges that it "offers the movement of rafts, independent of the movement of people, for those raft companies that want to preposition their rafts up river for persons arriving via other means of transportation."[18] However, this allegation is contradicted by the record. DRGHF's new claim contradicts its statement in discovery that all of its freight traffic from 2009 through 2012 consisted of raft movements sold as a package with the tourist excursion service, so that a single ticket price covered both the passenger fare and "an additional flat-car carried in consist to haul the raft."[19] DRGHF provides no new evidence to support its new characterization of its movement of rafts. DRGHF's claims regarding possible movements of livestock are also unsupported.

DRGHF also now argues that, although it does not have a formal interchange agreement with SLRG, DRGHF and SLRG are interchanging cars. But the switch connecting the Creede Branch to SLRG's Alamosa Subdivision at South Fork was locked in 2008 at the order of FRA—indicating that carriers are unable to interchange cars with one another at that location.[20] No pleadings (including those filed more recently) have suggested that the switch has subsequently been unlocked.

DRGHF cites its lease of a concession car and locomotive to SLRG in 2006-2007 as a past interchange of traffic. DRGHF argues that such leasing is an "integral part of the railroad's

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[15] Id. at 10.

[16] Id. at 11-12.

[17] E.g., Thompson v. Chi., Burlington & Quincy R.R., 157 I.C.C. 775, 777 (1929).

[18] DRGHF Pet. for Reconsideration 8.

[19] See Respondents' Reply Statement, Ex. H (response to Interrogatory 19).

[20] See DRGHF Response 6 (filed Oct. 11, 2011).

interstate operations," and cites 49 C.F.R. pt. 1033 (which addresses car service) as support.[21] However, one isolated lease that took place several years ago is not enough to transform DRGHF's current activities on the Parcel into transportation under the Board's jurisdiction.[22]

DRGHF also argues that its storage of rail cars is a use of the Parcel that constitutes jurisdictional transportation.[23] Again, however, not all of a rail carrier's activities are inherently under the Board's jurisdiction, and as the Board found in the August 18 Decision, DRGHF's use of the Parcel—including storage of railroad-related equipment—is not in support of transportation subject to the Board's jurisdiction. See August 18 Decision at 5, 7, 9-11.[24] And as discussed below, DRGHF has not presented new evidence that would mandate a different result.

Thus, DRGHF has not demonstrated material error in the Board's finding that the activities taking place on the Parcel "are not transportation that is conducted under the Board's jurisdiction 'as part of the interstate rail network' …. [and thus] provide no basis for finding the City's ordinance preempted under § 10501(b)."[25]

Citing Riffin v. STB (Riffin), 592 F.3d 195 (D.C. Cir. 2010), and Pike v. Bruce Church (Pike), 397 U.S. 137 (1970), Strohmeyer contends that the Board erred in not finding the Parcel a maintenance-of-way facility for the Line and as such subject to Board jurisdiction. However, neither Riffin nor Pike support that contention. Riffin focused on whether rail facilities must be adjacent to the rail carrier's line to be subject to the Board's jurisdiction—a contention that was not the basis for the Board's decision in this case.[26] And Pike did not involve transportation by rail. Moreover, the jurisdictional determination in the August 18 Decision was based on the conclusion that the Parcel is not subject to the Board's jurisdiction because the operations

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[21] DRGHF Pet. for Reconsideration 9-11.

[22] See Wine Train, 7 I.C.C. 2d at 967 (although a rail carrier by way of an OFA acquisition, Wine Train's minimal freight operations—on average less than one carload of freight a month and no regularly scheduled freight service—"do not provide a sufficient nexus to interstate commerce to permit Federal regulation of Wine Train's intrastate operations.").

[23] Id. at 11-12.

[24] Also, DRGHF has not presented evidence showing that SLRG plans any future use of the railroad equipment that DRGHF is storing on the Parcel.

[25] August 18 Decision at 18.

[26] This question is not yet settled, because the Board, on remand from the D.C. Circuit, reached a jurisdictional determination on other grounds. Specifically, the Board determined that an alleged maintenance-of-way facility owned by Riffin did not fall under Board jurisdiction because Riffin did not have title or other legal interest in the rail line allegedly supported by the facility and therefore was not a rail carrier with respect to the rail line. See James Riffin—Pet. for Declaratory Order, FD 34997 (STB served July 13, 2011).

conducted on the Line do not constitute transportation within the Board's jurisdiction under § 10501.

Strohmeyer also argues that the fact that DRGHF runs a tourist train is irrelevant to determining whether it is a common carrier subject to the Board's jurisdiction. He claims that many rail carriers operate tourist trains and are still entitled to preemption. Specifically, he points out that two rail carriers owned by IPH, Saratoga and North Creek Railway, LLC (SNCR), and Santa Cruz & Monterey Bay Railway (SCMBR), operate tourist trains that account for the bulk of their revenues and operate exclusively over most of their track. Asserting that it is not disputed that these two rail carriers owned by IPH are subject to the Board's jurisdiction, Strohmeyer contends that DRGHF's use of "the proceeds from its tourist train operations . . . to fund its track maintenance program [and] subsidize its common carrier operations" establish that the maintenance of its track is "a part of 'transportation'" subject to the Board's jurisdiction.

The Board has never had to rule on whether SNCR or SCMBR operate in interstate commerce.[27] However, Strohmeyer states that both rail carriers perform common carrier freight operations notwithstanding that they earn the bulk of their revenue from tourist train operations. Moreover, the Board's jurisdiction does extend to rail carriers operating intrastate passenger excursion service, even if they earn the bulk of their revenue from that service, as long as they are performing more than "minimal" freight operation in interstate commerce.[28] DRGHF does not conduct any operations aside from its intrastate passenger excursion service and related movement of rafts. Strohmeyer's claims regarding SNCR and SCMBR operations do not demonstrate material error in the August 18 Decision.

2. Allegations of New Evidence. DRGHF submitted a March 20, 2013 letter from the Railroad Retirement Board (RRB), which determined at Mr. Shank's request that DRGHF is a "line haul rail carrier operating in interstate commerce."[29] The RRB letter notes that "Mr. Shank stated that starting in 2011 [DRGHF] began providing less-than-carload rail freight service [that] encompassed the movement of recreational vessels between South Fork and Wagon Wheel Gap, Colorado. . . . that total freight revenue for calendar year 2011 was approximately $850.00 [and] that [DRGHF] has reached a tentative agreement with another entity to permit that entity to act as the 'designated freight carrier' for the line."[30]

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[27] See Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line, FD 35631 (STB served June 1, 2012); Santa Cruz & Monterey Bay Ry.—Acquis. & Operation Exemption—Union Pac. R.R., FD 35659 (STB served Aug. 17, 2012).

[28] See, e.g., Wine Train, 7 I.C.C. 2d at 967.

[29] DRGHF Pet. for Reconsideration 12 & Ex. 1.

[30] DRGHF Pet. for Reconsideration, Ex. 1 at 1-2. "[D]esignated freight carrier" might refer to an attempt by Riffin and Strohmeyer to acquire and operate an approximately seven-mile portion of the Line and to acquire trackage rights over the Line. They stated that either they or their designee would operate the Line. The Board rejected the notice of exemption they filed,

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The RRB administers the Railroad Retirement Act (RRA), 45 U.S.C. § 231 et seq., and the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. § 351 et seq., which define a covered employer as a railroad subject to the Board's jurisdiction. Here, as noted in the August 18 Decision and as recognized by the RRB, the Board has licensed DRGHF as a Class III rail carrier. It is the Board's responsibility, however, to determine whether an entity is in fact performing transportation subject to Board jurisdiction.[31] The RRB letter is not a determination that DRGHF's activities are transportation subject to Board jurisdiction.

DRGHF also submitted a copy of what it refers to as its first freight tariff, which shows a publication date of December 10, 2012, and an effective date of January 1, 2013. The tariff contains local rates for freight shipments moving between points on the Line and proportional rates for freight shipments moving beyond the Line via SLRG and UP. Citing SMS Rail Services, Inc.—Petition for Declaratory Order, FD 34483 (STB served Jan. 19, 2005), DRGHF argues that the tariff is evidence of its holding out to serve the public as a rail common carrier. However, there is no question that DRGHF is a common carrier as the Board has already licensed DRGHF as a Class III rail carrier. Instead, the question here is whether DRGHF is performing Board-jurisdictional transportation over the Line and thus whether its activities on the Parcel in support of such transportation are covered by federal preemption. DRGHF's publication of a tariff containing interstate proportional rates does not make its non-jurisdictional operations (or its activities on the Parcel in support of those non-jurisdictional operations) transportation covered by § 10501 preemption.

Finally, DRGHF states that Strohmeyer has been hired as its Director of Rail Freight Services, that he will be filing a verified statement detailing DRGHF's "past, present, and future plans and initiatives," and that DRGHF is about to implement plans that involve "freight movements as part of the interstate rail network."[32] DRGHF claims that it is in the process of

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finding it unclear and requiring a more detailed examination of the proposed acquisition and operation than could be afforded through the streamlined notice of exemption process under 49 C.F.R. § 1150.31. See James Riffin & Eric Strohmeyer—Acquis.& Operation Exemption—in Rio Grande & Mineral Cntys., Colo., FD 35705 (STB served Jan. 11, 2013). The United States Court of Appeals for the D.C. Circuit denied Strohmeyer's and Riffin's challenge to the Board's rejection of their notice. Strohmeyer v. STB, No. 13-1064 (D.C. Cir. Dec. 30, 2013).

[31] See, e.g., Rail-Term Corp. v. R.R. Ret. Bd., No. 11-1093 (D.C. Cir. Nov. 14, 2011) (holding in abeyance judicial review of RRB decisions to allow the Board to rule on jurisdictional issues involving the reach of the Interstate Commerce Act); Am. Orient Express Ry.—Pet. for Declaratory Order, FD 34502 (STB served Dec. 27, 2005), aff'd sub nom. Am. Orient Express Ry. v. STB, 484 F.3d 554 (D.C. Cir. 2007) (RRB stayed its proceedings to allow the Board to rule on jurisdictional issues).

[32] DRGHF Pet. for Reconsideration 13-14.

negotiating an agreement with an east coast shipper that will entail movements of rail cars between the Line and the east coast, and that it plans to attempt to execute a formal interchange agreement with SLRG. In addition, DRGHF claims that Strohmeyer has ascertained that there is an unmet demand for public transloading facilities in Monte Vista and that he is evaluating plans to seek authority from the Board to acquire and operate the Parcel as a second rail line.[33] We find DRGHF's assertions regarding its present and future plans vague and speculative. DRGHF has not provided evidence in support of these claims. These claims provide no basis for reconsidering our initial determination that DRGHF's activities on the Parcel are not in support of transportation by rail carrier subject to the Board's jurisdiction and thus not covered by federal preemption.

In summary, we find that DRGHF has failed to either demonstrate material error in the August 18 Decision or present new evidence that would mandate a different result. Accordingly, DRGHF's petition for reconsideration will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Respondents' Joint Motion to Strike Strohmeyer's Notice of Intent to Participate With Comments is denied, and their reply to Strohmeyer's Comments is accepted into the record.

2. Riffin's "Notice of Intent to Participate as a Party of Record With Comments or in the Alternative Motion to Intervene" is denied.

3. DRGHF's petition for reconsideration is denied.

4. This decision is effective on the date of service.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.

[33] Id. at 14.